Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Satellite Home	)	
Viewer Improvement Act of 1999:	)	CS Docket No. 00-96
	)	
Broadcast Signal Carriage Issues	)	
	)	

To: The Commission

JOINT COMMENTS OF THE ASSOCIATION OF AMERICA'S PUBLIC TELEVISION STATIONS THE PUBLIC BROADCASTING SERVICE AND THE CORPORATION FOR PUBLIC BROADCASTING

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EXECUTIVE SUMMARY

The maturation and tremendous growth of DBS as a cable competitor have triggered various rights and responsibilities with respect to the carriage of local broadcast stations. Having secured a compulsory copyright license to carry local broadcast stations, DBS carriers have an attendant public interest obligation to carry all the stations, including the noncommercial educational television ("NCE") stations, in the markets they serve. This obligation is particularly important for NCE stations, which have a federal mandate to serve the entire American public and lack the retransmission consent rights that facilitate carriage negotiations outside of the must carry context. In this proceeding, the Commission should be particularly mindful of how the DBS must carry regime it adopts will allow NCE stations to obtain DBS carriage and will permit the ability of satellite subscribers to view their local NCE stations easily and in their entirety.

In particular, APTS, PBS, and CPB urge the Commission to take the following steps:

- Require that if a satellite carrier provides any station in a market, it also provides the eligible NCE stations in light of Congress's repeated insistence on public access to such stations;
- Mandate that satellite carriers carry the same NCE stations in a market that cable systems are obligated to carry;
- Require that local receive facilities be located within the Grade B contours and no more than 50 miles from the principal community of license of any local station eligible for carriage;
- Obligate satellite carriers to carry the same local NCE station signal content that cable systems are obligated to carry; such signal content should be carried without material degradation such that the signal content does not appear materially worse to the average viewer than that of other DBS video channels or that of the same signal as received at the local receive facility;
- Ensure that all local stations, whether carried under must carry or retransmission consent, are placed on contiguous channels; such stations should be made accessible to viewers through a navigational platform, menu, and/or electronic program guide in the same

general fashion as are other types of video programming (whether affiliated with the satellite carrier or not);

- Immediately issue a Notice of Proposed Rulemaking on DBS carriage of local digital signals in lieu of analog signals so that provisions for the transition from analog to digital broadcasting are in place by 2002; and

- Acknowledge that the Commission has broad authority to hear satellite carriage complaints and must offer timely and appropriate relief.

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AND
THE CORPORATION FOR PUBLIC BROADCASTING

The Association of America's Public Television Stations ("APTS"),[1] the Public Broadcasting Service ("PBS"),[2] and the Corporation for Public Broadcasting ("CPB")[3] (collectively referred to as "Public Television") hereby submit these comments to the Commission's Notice of Proposed Rulemaking in the above-captioned proceeding,[4] seeking

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[1] APTS is a nonprofit organization whose members comprise the licensees of nearly all of the nation's 353 noncommercial educational television stations. APTS represents public television stations in legislative and policy matters before the Commission, Congress, and the Executive Branch and engages in planning and research activities on behalf of its members.

[2] PBS is a nonprofit membership organization of the licensees of the nation's public television stations. PBS distributes national public television programming and provides other program-related services to the nation's public television stations.

[3] CPB is a private, nonprofit corporation created and authorized by the Public Broadcasting Act of 1967 to facilitate and promote a national system of public telecommunications. *See* 47 U.S.C. § 390 et. seq.

[4] *Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues, Notice of Proposed Rulemaking*, FCC 00-195, CS Docket No. 00-96 (rel. June 9, 2000) ("NPRM").

comment on proposals to implement the "must carry" provisions of the Satellite Home Viewer Improvement Act of 1999 ("SHVIA").[5] With this proceeding, along with the companion actions to implement SHVIA,[6] the Commission takes steps to impose regulatory parity on Direct Broadcast Satellite ("DBS") and cable, recognizing that differences between the two technologies require slightly different implementation of the same principles.[7] Therefore, this proceeding must generally end in the carriage of the same local NCE stations by DBS and cable, at roughly the same cost to the stations, in generally the same manner, and resulting in the same ease of access for viewers.

Congress concluded that "[b]ecause satellite can provide direct competition with the cable industry, it is in the public interest to ensure that satellite operates under a copyright framework that permits it to be an effective competitor."[8] To accomplish the goal of regulatory parity, Congress granted DBS service providers a new statutory compulsory copyright license to retransmit the local signals of broadcast stations, including public television stations, into their own local markets or Designated Market Areas ("DMA"s).[9] As a condition of granting the

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[5] Pub. L. No. 106-113, 113 Stat. 1501, Appendix I (1999).

[6] *See, e.g., In re Implementation of the Satellite Home Viewer Improvement Act of 1999, Retransmission Consent Issues: Good Faith Negotiation and Exclusivity, First Report and Order*, FCC 00-99 (2000); *Implementation of the Satellite Home Viewer Improvement Act of 1999, Retransmission Consent Issues: Enforcement Procedures for Retransmission Consent Violations, Order*, FCC 00-22 (2000).

[7] *See, e.g.*, Joint Explanatory Statement of the Committee of Conference on H.R. 106-1554, 145 Cong. Rec. at H11792 (Daily ed. Nov. 9, 1999) ("Conference Report") ("[P]romotion of competition in the marketplace for delivery of multichannel video programming is an effective policy to reduce costs to consumers. To that end, it is important that the satellite industry be afforded a statutory scheme for licensing television broadcast programming similar to that of the cable industry. At the same time, the practical differences between the two industries must be recognized and accounted for.").

[8] *Id.*

[9] *See* 17 U.S.C. §122(a); *see also* 47 U.S.C. §339(a)(1)(B) ("[A]ny satellite carrier may also provide service under the statutory license of section 122 of title 17 to the local market within which such household is located."). A DMA "means a designated market area as determined by Nielsen Media (continued...)

statutory local license, Congress mandated that on January 1, 2002, a satellite carrier that carries at least one local signal in a market must carry upon request all local broadcast stations' signals.[10] Before the commencement of local must carry obligations, Congress wanted DBS subscribers to have access to public television programming. Thus, Congress created a second compulsory copyright license that will allow DBS to carry a PBS national feed until the end of 2001. At that time, this second compulsory license will expire, and the must carry obligations will ensure the retransmission of the local NCE stations within their markets.[11] Notably, there is nothing to stop DBS carriage of local NCE signals instead of or in addition to the PBS national feed in local markets during the transitional period. In fact, Public Television strongly supports such carriage of local NCE stations.

In considering each of the questions in this proceeding, the Commission must ensure that the congressional goal of providing satellite subscribers with access to local NCE signals beginning in 2002 is effectuated in a meaningful and practical way. Specifically, the Commission needs to take into account the delivery of local NCE signals in: (1) implementing the basic DBS carriage obligation; (2) requiring truly local points of reception for local signals; (3) limiting only substantial duplication; (4) implementing the requirement that the entire signal be carried without degradation; (5) implementing the channel positioning and navigational

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Research and published in the 1999-2000 Nielsen Station Index Directory and Nielsen Station Index United States Television Household Estimates or any successor publication." 17 U.S.C. §122(j)(2)(C). A noncommercial station's DMA includes "any station that is licensed to a community within the same designated market area as the noncommercial educational television broadcast station," and also includes the county in which the station's community of license is located. 17 U.S.C. §122(j)(2)(A)-(B).

[10] *See* 47 U.S.C. §338(a).

[11] *See* 17 U.S.C. § 119(a)(1); Conference Report at H11795.

nondiscrimination requirements; (6) considering subsequent DTV carriage; and (7) implementing an effective and efficient dispute resolution mechanism.

I. Local Noncommercial Educational Stations Have A Special Status Under SHVIA, And The Commission Should Take All Necessary Steps To Ensure Adequate Public Access Consistent With SHVIA

Section 338 of the Communications Act, as added by SHVIA, provides that, beginning in 2002, if a satellite carrier avails itself of the statutory copyright license to provide one local station to viewers in a market, it must also provide all other local stations that request carriage in that market.[12] This carriage requirement grows out of Congress's recognition of "the importance of protecting and fostering the system of television networks as they relate to the concept of localism."[13] Local commercial stations may elect to be carried by satellite, as by cable, under either the must carry regime or through retransmission consent agreements under the newly-amended Section 325(b) of the Communications Act.[14] But Section 325(b) does not apply to a "noncommercial television broadcast station."[15] Therefore, local NCE stations generally must rely on must carry in order to have their signals carried on a DBS service after December 31, 2001. The Commission should recognize the practical impact of the fact that NCE stations are intended to be carried pursuant to the must carry regime. In light of this fact and the federal government's longstanding commitment to the accessibility of public television, the Commission should adopt rules that ensure adequate public access to this unique public television resource.

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[12] *See* 47 U.S.C. §338(a)(1) ("[E]ach satellite carrier providing, under section 122 of Title 17, secondary transmissions to subscribers located within the local market of a television broadcast station of a primary transmission made by that station shall carry upon request the signals of all television broadcast stations located within that local market, subject to section 325(b).") (emphasis added).

[13] Conference Report at H11792.

[14] *See* 47 U.S.C. §325(b)(1).

[15] 47 U.S.C. §325(b)(2).

A. SHVIA Reflects Congress's Long-Held Commitment To Public Access To Local NCE Stations

Congress was explicit in the legislative history of SHVIA that the dual purposes of the Act were to preserve the principle of localism[16] and to ensure the widespread dissemination of information from a multiplicity of sources.[17] Congress emphasized that SHVIA will enable satellite subscribers to access "the television signals they want most: their local stations" without fear that those signals will be turned off.[18] For this reason, Congress adopted must carry provisions to allow subscribers to receive all local broadcast signals, both commercial and noncommercial, in their respective markets.[19] The existence of separate provisions for the satellite carriage of commercial and noncommercial stations, the fact that noncommercial stations are not included in the retransmission consent regime, and the expiration of the PBS national feed compulsory license in 2002, all reflect Congress's intent that the Commission design rules especially to effectuate DBS carriage obligations with respect to NCE stations.

The concern for public access to public television is in keeping with a long history of congressional support for strong and diverse NCE stations that are accessible by everyone with a television set, regardless of whether those stations are received over-the-air or through a multichannel video program distributor. Since spectrum was set aside exclusively for use by public television stations in 1952, Congress "repeatedly and unequivocally has supported public

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[16] *See* Conference Report at H11792 ("[T]he Conference Committee reasserts the importance of protecting and fostering the system of television networks as they relate to the concept of localism.").

[17] *See id.* at H11795 ("The proposed provisions are intended to preserve free television for those not served by satellite or cable systems and to promote widespread dissemination of information from a multiplicity of sources.").

[18] *Id.* at H11793.

[19] *See id.* at H11795.

telecommunications services."[20] In 1967, when it enacted the Public Broadcasting Act, Congress recognized that "the economic realities of commercial broadcasting do not permit widespread commercial production and distribution of educational and cultural programs which do not have a mass audience appeal."[21] It noted the same predicament when it established the National Endowment for Children's Educational Television in 1989.[22] Moreover, the CPB authorizing statute states that "[p]ublic television and radio stations constitute valuable local community resources for utilizing electronic media to address national concerns and solve local problems."[23]

When considering the 1992 Cable Act, Congress observed that itself, along with:

> the American taxpayer have given public television unprecedented support over the last three decades, and public television stations have developed a wide variety of distinctive, award-winning program services. The government has a compelling interest in ensuring that these services remain fully accessible to the widest possible audience *without regard for the technology used to deliver these educational and information services.*[24]

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[20] H.R. Rep. No. 102-628, at 68 ("*1992 Cable Act House Report*").

[21] H.R. Rep. No. 90-572, at 10-11 (1967).

[22] *See* S. Rep. No. 101-66, at 12 (1989).

[23] 47 U.S.C. § 396. This opinion has been borne out by the numbers. 95% of all public television stations receiving CPB grants reported providing instructional service to schools during the 1995-96 academic year, including 81% providing instructional programming to elementary schools and 79% providing instructional programming to secondary schools during that time period. *See In re Reexamination of the Comparative Standards for Noncommercial Educational Applicants, Report and Order*, MM Docket No. 95-31, FCC 00-120 (rel. Apr. 21, 2000).

[24] H.R. Rep. No. 102-628, at 69 (emphasis added); *see also* H. Rep. No. 102-363, at 18 (1991) ("[T]he full potential of telecommunications as a means to address educational issues can be realized only if the public is provided access to public service programming through all distribution technologies -- not just broadcast -- that are available to them. To achieve this potential, the sound public policy of reserving broadcast channels for public television and radio should be extended to reserve capacity for public service programming on new distribution technologies."); S. Rep. No. 102-221, at 7 (1991).

In the DBS context, years before adopting Section 338, when local-into-local was a faraway prospect, Congress took pains to ensure that the public would have access to noncommercial television programming and NCE stations.[25]

The Commission, too, has been steadfast in its support for public television, defending noncommercial reservations over the years[26] and reserving additional channels to further the reach of public television service,[27] to provide better picture quality,[28] and to permit the formation of networks of noncommercial educational stations.[29] Most recently, the Commission carried over its channel reservation policy to its allotment of digital television ("DTV") channels to broadcasters by committing to reserve noncommercial educational DTV channels for existing

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[25] *See* 47 U.S.C. § 335 (setting forth DBS set-aside public interest obligations). The DBS set-aside provision "represents nothing more than a new application of a well-settled government policy of ensuring public access to noncommercial programming." *Time Warner Entertainment Co. v. FCC*, 93 F.3d 957, 976 (1996).

[26] *See, e.g., Television Assignments in New Smyrna Beach, Fla.*, 50 R.R.2d 1714 (1982); *Television Assignments in Houston, Tex.*, 50 R.R.2d 1420 (1982); *Table of Assignments in Ogden, Utah*, 26 F.C.C.2d 142 (1970), *recon. denied*, 28 F.C.C.2d 705 (1971); *Channel Assignments in Hamilton, Ala.*, 21 R.R. 1577 (1961); *Channel Assignments in Longview-Denton, Tex.*, 17 R.R. 1549 (1958); *recon. denied*, 17 R.R. 1552a (1959); *Channel Assignments to Des Moines, Iowa*, 14 R.R. 152d (1956), *recon. denied*, 14 R.R. 1528 (1956).

[27] *See Television Channel Assignment at Anchorage, Alaska*, 68 R.R.2d 1121 (1990); *Television Channel Assignment at Victoria, Tex.*, 52 R.R.2d 1508 (1983); *Television Channel Assignment at Seaford, Del.*, 43 R.R.2d 1551 (1978); *Television Channel Assignment at Mountain View, Ark.*, 38 R.R.2d 1298 (1976); *Television Channel Assignment at Eufaula, Okla.*, 35 R.R.2d 1039 (1975); *Television Channel Assignment at Booneville, Miss.*, 27 R.R.2d 246 (1973); *Television Channel Assignment at Parsons, Kan.*, 23 R.R.2d 1707 (1972); *Television Channel Assignment in the V.I.*, 20 R.R.2d 1659 (1970) (mileage separation requirements with co-channels in Puerto Rico waived; the most important factor for waiver is that the channels were for educational use); *Television Channel Assignments at Las Cruces, N.M.*, 14 R.R.2d 1518 (1967) (18 UHF channels assigned to Hawaii, with 9 reserved for noncommercial educational use); *Television Channel Assignment at Eagle Butte, S.D.*, 10 R.R.2d 1767; *Television Channel Assignment in Staunton, Va.*, 5 F.C.C.2d 537 (1966).

[28] *See Television Channel Assignments at Nashville, Tenn.* 26 R.R.2d 1667 (1973).

[29] *See Television Channel Assignments at McGill, Nev. and Richfield, Utah*, 24 R.R.2d 1855 (1972).

public broadcasters and to preserve vacant noncommercial allotments in its allotment plan.[30] In so doing, the Commission recognized "the important role noncommercial educational stations play in providing quality programming to the public and the financial constraints they face in building and running their stations."[31] The Commission should interpret SHVIA in light of this history of strong support for NCE stations and ensure that implementation of SHVIA does not result in a limitation of access by the public to local NCE stations.

B. Avoidance Of Public Television Must Carry Obligations Is Inconsistent With The Purpose Of SHVIA

Although SHVIA is constructed to ensure carriage of noncommercial stations in those markets where commercial stations are being carried, the Commission points to a possible reading of SHVIA which could allow satellite carriers to avoid local NCE carriage obligations altogether. Such a result would be at odds with the structure and purpose of the NCE satellite must carry provisions and would create a loophole for DBS carriers with respect to local NCE signals where none exists for cable operators. According to the Commission's reading of SHVIA, a satellite carrier, unlike a cable operator, could avoid the must carry rules if, in carrying a commercial station under the Section 325(b) retransmission consent provisions, it also negotiates for all necessary copyrights and does not take advantage of SHVIA's local-into-local statutory compulsory copyright license.[32] Under these circumstances, a carrier could provide the

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[30] *See Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, Second Report and Order/Further Notice of Proposed Rulemaking*, 7 FCC Rcd 3340, 3350-53 (1992) ("*DTV Second Report & Order*"); *Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, Third Report and Order/Third Further Notice of Proposed Rulemaking*, 7 FCC Rcd 6924 (1992).

[31] *DTV Second Report & Order,* 7 FCC Rcd at 3350.

[32] *See* NPRM ¶10.

largest commercial stations in a market without providing any local NCE stations.[33] Under the Commission's reading, there is a risk that even if local NCE stations could, like their commercial counterparts, convey the rights to the programming contained in their signals, DBS carriers would not be compelled to carry the NCE stations even though such NCE stations would continue to lack the statutory privilege of retransmission consent. Therefore, local NCE stations would at once be deprived of any must carry rights that would *ensure* their carriage and be shackled from engaging in retransmission consent discussions that would *allow* their carriage.

Public Television believes that the Commission should correct the "heads-I-win-tails-you-lose" quality of this reading of SHVIA. Section 338(a), taken in context, should not be read as creating a loophole through which satellite carriers can avoid their statutory obligation to provide NCE stations to subscribers served with other local signals. In fact, SHVIA does not provide clear direction on the fate of local NCE stations in the event that carriers do not use the Section 122 compulsory license. While Section 338(a) does suggest a linkage between application of the must carry regime and exploitation of Section 122, the exclusion of NCE stations from the benefits of retransmission consent, the affirmation of the importance of public access to public television in SHVIA and other laws, the provision of a separate must carry structure for NCE stations, and the intent of Congress that DBS and cable carriage obligations be virtually co-extensive,[34] all suggest that, in fact, Congress intended for eligible local NCE stations to be carried *whenever and however* a DBS system was providing local stations in the same market. Moreover, newly amended Section 325(b)(5) states that "[t]he exercise by a

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[33] Smaller commercial stations would also be affected by the nullification of the must carry rules, although, because they have retransmission consent rights, they would have the ability to arrange for carriage through private negotiations.

[34] *See* Conference Report at H11792 and 47 U.S.C. § 338(c)(2), as discussed at Section III below.

television broadcast station of the right to grant retransmission consent under this subsection shall not interfere with or supercede the rights under section 338, 534, or 535 of this title of any station electing to assert the right to signal carriage under that section."[35] The Commission should effectuate the must carry rights of NCE stations by not allowing satellite carriers to exploit retransmission consent negotiations to avoid carrying local NCE stations, which would indeed "interfere with or supercede" the must carry rights of such NCE stations under Section 338.

The Commission has latitude, within its general powers and consistent with cannons of statutory construction, to interpret SHVIA to avoid nullifying the NCE station must carry rules.[36] It has been entrusted with particularly broad authority to structure and enforce satellite carriage obligations with respect to NCE stations. For example, under Section 338(c)(2), the Commission has the authority, constrained only by the parameters of the cable carriage rules, to determine which NCE stations must be carried. Furthermore, the lack of NCE retransmission consent rights makes the Commission a guardian of NCE station carriage in a way that it is not for commercial stations. Given this special authority, the Commission should acknowledge the unique contributions of NCE stations to public discourse (a) by recognizing that the structure and purpose of SHVIA support DBS carriage of local NCE stations in markets where local

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[35] 47 U.S.C. §325(b)(5). 47 U.S.C. §§ 534 & 535 are the codification of §§ 614 & 615 of the Communications Act.

[36] *See Pan American World Airways, Inc. v. United States*, 371 U.S. 296 (1963) (explaining that regulatory agencies are empowered to cure the ills that arise within their purview). In addition, courts have frequently stated that one must avoid interpretations of a statute that would result in absurd consequences. "[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) (citing *United States v. American Trucking Ass'n*, 310 U.S. 534, 542-543; and *Haggar Co. v. Helvering*, 308 U.S. 389, 394 (1940)); *see also Clinton v. City of New York*, 524 U.S. 417, 429 (1998).

commercial stations are being carried and (b) by asserting that it will take all necessary steps to ensure such carriage.

C. Procedural Rules For Satellite Carriage Should Be Simple, Transparent, And Fair

The Commission asks whether a carrier should be required to notify local stations in a market in writing of their carriage rights once any local station in that market is being carried.[37] Public Television believes that it should. Furthermore, consistent with the arguments above, such notifications should be made whether the station is carried under the Section 122 compulsory license or pursuant to private copyright negotiations. The first written notification should be provided on September 1, 2001, to all local stations in any market in which a local station is already being carried. Thereafter, written notifications should be provided to all local stations in a market at least 30 days prior to the carriage of any local station in that market. Advance notice is necessary to ensure that stations can exercise their carriage rights at the earliest possible time. The notification should inform stations not only of what local stations are being carried, but also on what channel number, at what compression ratios, as part of what service package, at what prices to the consumer, and whether the signals carried originate in digital or analog format. This additional information will help stations to plan for carriage and exercise their must carry rights. In addition to sending this information to the stations, the carrier should make it available to the Commission and to the public by keeping it for inspection at the carrier's main offices.[38]

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[37] *See* NPRM ¶11.

[38] The Commission has required carriers to make other information available in this way. *See, e.g., Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992: Direct Broadcast Satellite Public Interest Obligations, Report and Order*, 13 FCC Rcd 23254 (1998) "*DBS Set-Aside Order*").

II. Local Receive Facilities Should Be Sited Within Markets At Locations That Are Reasonably Accessible To All Stations

SHVIA provides that a station exercising its must carry rights must "bear the costs associated with delivering a good quality signal to the designated local receive facility of the satellite carrier or to another facility that is acceptable to at least one-half the stations asserting the right to carriage in the local market."[39] The Commission asks for comment on how to define a "local receive facility," on what would constitute a "good quality signal" for satellite carriage purposes, and on related issues.[40]

The guiding principle in considering these issues should be that the satellite carriage rules must approximate the cable carriage rules, accounting for the differences in technology. In the cable context, the local station must deliver a good quality signal to the system's headend.[41] The number of cable headends in a market, typically located at fairly close intervals, varies greatly (from just a few to more than one hundred) depending on, among other things, how many franchising authorities there are and whether local requirements necessitate a local headend. Generally, however, there is a cable headend that is fairly close to a given local television transmission facility, making delivery of a good quality signal fairly easy and inexpensive for most stations.

Recognizing that satellite carriers do not have headends and cannot be expected to deploy receive facilities in every location where a cable headend exists, the Commission must address how a local receive facility can reasonably substitute for a cable headend in terms of

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[39] 47 U.S.C. §338(b)(1).

[40] NPRM ¶18.

[41] *See* 47 U.S.C. § 534(h)(1)(B)(iii) (commercial) and 47 U.S.C. § 535(g)(4) (noncommercial); 47 C.F.R. § 76.55(c)(3) (commercial); 47 C.F.R. § 76.55(b) (noncommercial).

geographical proximity to the local station. The Commission suggests that it would be most economically feasible for carriers to aggregate the signals of stations within a market at one receive facility in that market.[42] While this may be true, SHVIA does not privilege the carrier's financial well-being over that of the local stations. Rather, the Commission should balance the needs of carriers and stations, keeping in mind the particular constraints of local NCE stations. One local receive facility per market is far too few. Large markets, particularly in the West, may cover hundreds of miles with potentially mountainous terrain, and the receive facility may be located beyond or at the far reaches of a local station's Grade B signal. In order for a local station to deliver a good quality signal to the receive facility, it might have to relay the signal over microwave or fiber at a cost of $30 to $60 per mile per month. NCE stations in particular would be unable to bear that kind of expense, rendering their must carry-rights all but meaningless. Public Television believes that it would be reasonable to require a carrier to locate a receive facility within the Grade B contour *and* not more than 50 miles from the community of license of each of the local stations in a market. This would not be excessively burdensome for satellite carriers, since in most cases there will be substantial overlap in the Grade B contours of all the stations in a market. Moreover, the standard proposed herein reflects the judgment made by Congress and the Commission in the cable carriage context that 50 miles is the reasonable maximum distance over which to expect a local NCE station to deliver its signal.[43]

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[42] NPRM ¶ 18.

[43] The location of cable headends is particularly important for noncommercial stations because, as the Commission notes, a cable operator's principle headend (rather than the market) is used to determine the carriage requirement for local noncommercial television stations. *See* 47 U.S.C. §535(1)(2) ("The term 'qualified local noncommercial educational television station' means a qualified noncommercial educational television station -- (A) which is licensed to a principal community whose reference point . . . . is within 50 miles of the principal headend of the cable system; or (B) whose Grade B service contour . . . . . encompasses the principal headend of the cable system.). *See also* NPRM ¶ 7.

SHVIA permits local stations in a market to select an alternative receive site.[44] In response to the Commission's queries about this option, Public Television urges that the consent of at least one local NCE station eligible for carriage in the market be required before an alternate facility is chosen. This safeguard would ensure that collocated or clustered stations do not select a local receive site that is convenient for them but might be extremely expensive for one or more local NCE stations. Public Television advocates another safeguard as well: a procedure that would allow stations in the minority of a local receive siting decision to file a complaint with the Commission. In cases of hardship, the Commission should consider ordering that there be an additional or alternative site for a local receive facility.

The Commission asks under what procedures a satellite carrier must inform local stations of the location of the receive facility.[45] Notifications of receive facility sites should be provided in writing to all stations within a given market as soon as possible, but no later than September 1, 2001. The Commission should provide a mechanism whereby stations that do not believe the receive facility is located in accordance with the rules can file a complaint with the Commission within 30 days of receiving notice from the carrier. Carriers should have a 10 day response period, and such complaints should be resolved within 60 days. Notifications to stations should also be issued at least 60 days prior to any relocation of a local receive facility, and the same procedures governing complaints should apply.

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[44] *See* 47 U.S.C. § 338(b)(1) (stating that the local receive facility can be "another facility that is acceptable to at least one-half the stations asserting the right to carriage in the local market.").

[45] *See* NPRM ¶18.

Finally, the Commission seeks information on what constitutes a "good quality signal" as that term is used in Section 338.[46] The Commission has addressed matters relating to the provision of a good quality signal by broadcast stations asserting must carry rights in the cable context.[47] A cable operator is required to pick up the signal of a qualified local broadcaster who requests carriage, and the local broadcaster exercising its must carry rights has a corresponding obligation to provide the cable system with a signal that would be considered good quality if received off air.[48] Public Television sees no reason why the definition of a good quality signal should change in the satellite context. The same obligation – not more and not less – should attach to a broadcaster delivering a signal to a satellite receive facility. Therefore, Public Television recommends that the Commission adapt Section 76.55(c)(3) of its rules to apply to the provision of local broadcast signals to satellite carriers.[49] As in the cable context, local stations that cannot provide a good quality signal to the local receive facility over-the-air should

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[46] NPRM ¶ 20.

[47] *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Broadcast Signal Carriage Issues, Memorandum Opinion and Order*, 9 FCC Rcd 6723, 6735-36 (1994) ("*Cable Carriage Memorandum Opinion & Order*"); *Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Broadcast Signal Carriage Issues, Clarification Order*, 8 FCC Rcd 4142, 4143 (1993).

[48] The Commission's regulations also encourage cable operators to work with broadcasters to resolve problems affecting signal quality prior to the signal's delivery to the headend. *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Broadcast Signal Carriage Issues, Report and Order*, 8 FCC Rcd 2965, 2990 (1993) ("*Cable Carriage Report & Order*). The FCC should adopt a similar principle in the satellite context.

[49] Although Section 76.55(c)(3) of the Commission's rules applies only to the quality of the signal a local commercial television station delivers to the cable headend, the Commission uses the same standard to determine whether a local noncommercial station is delivering a good quality signal to the cable headend. *See Cable Carriage Memorandum Opinion & Order,* 9 FCC Rcd at 6735-36; *see also Complaint of Rural California Broad. Corp. Against Western Cabled Systems, Memorandum Opinion and Order*, 10 FCC Rcd 2743 (1995); *Michigan State Univ. Against Crystal Cable TV, Inc., Petition for Reconsideration*, 10 FCC Rcd 7 (1994). Satellite carriers should be required to employ the same sound engineering measurement practices as are cable operators in determining whether or not there is adequate signal strength. *See Cable Carriage Memorandum Opinion & Order*, 9 FCC Rcd. at 6736.

be permitted to deliver the signal in another way.[50] Providing stations such flexibility enhances the chances that local stations will be carried as part of a satellite package and furthers the goals of localism and competition underlying SHVIA.

III. The Same NCE Signals That Are Carried On Cable Should Be Carried On Satellite

In SHVIA, Congress directed the Commission to prescribe regulations limiting carriage of multiple local NCE stations, provided that "[t]o the extent possible, such regulations shall provide the same degree of carriage by satellite carriers of such multiple stations as is provided by cable systems under section [615 of the Communications Act]."[51] Section 615 defines which local NCE signals are eligible for carriage on a cable system (based on the identity of the licensee and the proximity of the station to the cable headend),[52] how many NCE stations a given cable system must carry (based on whether the cable system has fewer than 12, 13-36, or more than 36 usable activated channels),[53] and how many of the NCE stations can be considered substantially duplicative on the basis of a Commission-made test that holds stations to be non-duplicative unless they duplicate at least 50 percent of their schedules over any three-month period.[54] The Commission seeks comment on whether the approach to cable carriage of multiple

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[50] For example, the Commission explained in the *Cable Carriage Report & Order* that a broadcast station may use microwave, a translator, or other means to deliver a good quality signal to the cable headend. *See Cable Carriage Report & Order*, 8 FCC Rcd at 2991.

[51] 47 U.S.C. § 338(c)(2).

[52] *See* 47 U.S.C. §§ 535(1)(1)-(2); *see also* NPRM ¶ 27.

[53] *See* 47 U.S.C. § 535(b) & (e). Currently, cable systems with more than 36 usable activated channels must carry at least three qualified local NCE stations, but after satisfying their minimum carriage requirements, such systems are not required to carry stations whose programming "substantially duplicates" the programming of any other qualified station being carried on the system.

[54] *See* 47 U.S.C. § 535(e). Commission rules state that a station substantially duplicates the programming of another station if it broadcasts "the same programming, simultaneous or non-simultaneous, for more than 50 percent of prime time ... and more than 50 percent outside of prime time over a three-month period." 47 C.F.R. §76.56, note to (a)(1).

local NCE station signals under Section 615 is applicable in the satellite context and whether Congress intended for the Commission to fashion some new concept, other than that of duplication, to limit carriage of NCE stations. Given the plain instruction by Congress to use Section 615 as the template for DBS carriage of multiple NCE stations, it is quite clear that both the Section 615 substantive carriage results and methodology must be used in the satellite context.

A. Access To Multiple Local NCE Stations Serves The Public Interest

Before turning to how and why Section 615 should be the drafting template for implementing Section 338(c)(2), it is desirable to comment briefly on why there may be multiple NCE stations in a market and why Section 615 deems most of them worthy of carriage on a cable system. Substantial duplication of programming within the public television system is not generally widespread. In many circumstances, different public television signals in a market serve distinct but neighboring or interleaved communities. In general, the "secondary" stations within these "overlap" markets provide their own unique and valuable programming to members of the community in ways that complement the mission of the "primary" stations. These stations deliver college telecourses and video conferencing, minority-oriented programming, and other services designed to address the needs of rural communities. Indeed, a programming cooperative called the Program Resources Group exists to facilitate the development and distribution of unique programming for secondary stations to ensure a minimum of duplication.

For instance, while the full-service community station, WEDU, Tampa, Florida, addresses a general audience, WUSF, Tampa, a university licensee, serves the lifelong learning needs of young and working adults by offering college credit courses and a large variety of instructional training programs. WUSF provides satellite-delivered teleconferences for state, national, and international audiences, while WEDU serves its audience through a broader array of educational,

cultural, and public affairs programming. In the Los Angeles Metropolitan area, KCET, the full-service community licensee, produces both national programs for PBS and programs of local interest to the citizens of Southern and Central California, including nightly news and public affairs programs which focus on both the Los Angeles region and California as a whole. KOCE develops and distributes college telecourses for credit, as well as local programming unique to Orange County. The citizens of Miami are served by both WPBT and by WLRN, which serves the Hispanic population of Miami with instructional programming. Philadelphia is graced with both a general audience public television station, WHYY, and an additional station, WYBE, which broadcasts programming of a uniquely local nature, including coverage of local city events, political debates, town meetings, and school board meetings. WYBE also focuses on the city's growing immigrant community through a mix of ethnic language programming, including *Greek Spirit, Ukrainian Melody, Deutsche Welle, Korean News, Caribbean News Roundup*, and numerous others. In Washington, D.C., WETA is the general interest station known nationally for its coverage of public affairs, while WHUT focuses on the African-American community and provides telecourses through Howard University. Lastly, while KCTS addresses general audiences in the Seattle-Tacoma area, KBTC broadcasts exclusively to the rural areas of southwest Washington and also provides educational teleconferences for the region.

Congress and the Commission have long recognized that the existence of multiple public television stations in certain markets is not redundant. Rather, the multiplicity enables public television stations to address more effectively the varied interests of their communities through consistent attention to localism and diversity. For example, in the findings contained in the 1992 Cable Act, Congress stressed the government's "substantial interest in making *all* nonduplicative

local public television services available on cable systems,"[55] while in the report accompanying its version of the legislation, the House pointed to the government's "compelling . . . interest in increasing the amount of educational, informational and local public interest programming available to the nation's audiences."[56]

B. Growing Satellite Capacity Enables Carriers To Provide Access To The Richness Of Local Public Television Offerings

Section 338(c)(2), in instructing that the Commission's limitation of carriage obligations with respect to multiple local NCE stations "shall [to the extent possible] provide the same degree of carriage by satellite carriers . . . as is provided by cable systems," is quite clear: to the extent possible, if a local NCE station is carried on cable, it should be carried on satellite if the satellite carrier provides any local signals in that market.[57]

Undoubtedly, some commenters will argue that the capacity constraints on satellite make it impossible for them to be subject to the same requirements as their cable competitors. In considering these arguments and the extent to which it is "possible" to hold DTV and cable to the same carriage standards, the Commission should look ahead to 2002, when satellite capacity and local delivery capabilities will be vastly increased. As the Commission recognized two years ago, satellite capacity has been growing and will continue to increase at a rapid pace.[58] By 2002, with the advent of spot-beam technology, improved compression technology, and the

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[55] Cable Television Consumer Protection and Competition Act of 1992, Pub.L. 102-385, 106 Stat. 1460 (codified at 47 U.S.C. §521 *et seq.*), Section 2(a)(7).

[56] *1992 Cable Act House Report* at 69.

[57] 47 U.S.C. § 338(c)(2).

[58] *See DBS Set-Aside Order*, 13 FCC Rcd at 23284 (1998) ("We recognize that advances in digital compression technology will continue to expand the number of programming channels that can be offered to customers in a given amount of spectrum.").

addition of more transponder space at Ka-band, satellite capacity is expected to be more than ten times what it is today.

If satellite carriers were to use only their existing and currently planned Ku-band fleet to provide local signals -- an implausible assumption -- we could easily expect spot beam technology to permit a 4.5-fold increase in capacity. Currently, both DirecTV (which has 46 DBS frequencies) and EchoStar (which has 50 DBS frequencies) are providing in the neighborhood of 250 national video channels.[59] Spot beam technology will be used by both EchoStar[60] and DirecTV[61] by the end of 2001 to expand their video capacity and provide local-to-local service in additional markets. If these carriers were to upgrade just 18 of their available DBS frequencies with Ku-band spot beams for local service, both DirecTV and EchoStar would have 729 channels available for the carriage of local stations without any reduction in the capacity for national channels. According to Association of Local Television Stations estimates, this would allow for carriage of all eligible local stations through the 68th market (Charleston-Huntington).[62]

Of course Ka-band satellites will soon supplement the Ku-band capacity, providing far greater opportunity for satellite carriers to service local communities with local signals. EchoStar, for example, has been licensed for Ka-band at the 121° and 83° orbital locations and

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[59] *See* <www.qtm.net/~trowbridge/DBScomp.htm>.

[60] *See* EchoStar Press Release (Feb. 23, 2000) ("EchoStar VII and VIII will be advanced, high-powered direct broadcast satellites. Each will include spot-beam technology that will allow DISH Network to offer local channels in as many as 60 or more markets across the United States.").

[61] *See* DirecTV Press Release (Dec. 8, 1999) ("DIRECTV-4S, the HS 601HP satellite will be the first spacecraft in the DIRECTV fleet to use highly focused spot beam technology that will enable DIRECTV to expand its local channel offerings in metropolitan markets throughout the country.").

[62] *See* Association of Local Television Stations, "Estimated Number of Must Carry Stations Per Market" (2000).

has ordered a hybrid Ka-Ku-band satellite (EchoStar IX) to be delivered in 2002.[63] EchoStar's Ka-band satellite will be used for data and video services. Moreover, EchoStar has applied for an additional 1000 MHz of Ka-band capacity (500 MHz up and down) for the purpose of providing service that makes it more competitive with cable in combining conventional video and interactive services.[64] Local-into-local has long been considered a key to improving DBS competitiveness. Spot beams at Ka-band provide an even greater increase in capacity than they do at Ku-band. If EchoStar were to use just half of its existing 500 MHz of Ka-band capacity, without utilizing any of the Ka-band capacity it might yet be allocated, for local-to-local spot beams, it could carry 900 local stations (based on EchoStar's design of 48 spot beams per satellite).[65] This, in combination with a portion of the Ku-band capacity or additional Ka-band capacity could well accommodate all existing local stations. DirecTV also has plans for use of Ka-band, as recently announced by the DirecTV Broadband Satellite Service, which will be the next step toward "products and services that will operate on the Spaceway satellite platform" currently licensed at Ka band for the 99 and 101 degree orbital arc locations.[66]

To the extent that EchoStar and DirecTV do not want to expand commitments of their own licensed capacity to local-into-local, they could also contract with Local TV on Satellite (LTVS) to deliver the signals. Beginning in late 2002, LTVS intends to uplink to two satellites

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[63] *See* EchoStar Press Release (Feb. 23, 2000).

[64] *See In re EchoStar Satellite Corporation, Application for Minor Modification of Ka-Band Authorization*, File Nos. 167-SAT-P/L-95; 168-SAT-P/L-95; 54-SAT-AMEND-96 (Feb. 18, 2000).

[65] *See* Application of EchoStar Satellite Corporation For Authorization To Construct, Launch And Operate Two Ka Band Communications Satellites In The Domestic Fixed-Satellite Service (Sept. 29, 1995).

[66] Hughes Network Systems Press Release (Apr. 27, 2000), available at <http://www.hns.com/news/pressrel/csp_pres/p042700.htm>.